Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f., and AKZONA INCORPORATED,

Petitioners,

—v.—

U.S. INTERNATIONAL TRADE COMMISSION and E.I. Du PONT de NEMOURS and COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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May 18, 1987

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PETITIONERS' REPLY BRIEF

I. DUE PROCESS

The petition ("Pet.") presents important and recurring due process issues based on facts not disputed by respondents, including:

(a) Petitioners were denied access to all or part of 80% of the thousands of pages of exhibits received in evidence against them (DuPont Br. 4 n.4; Pet. 7 n.11), and were also excluded from the hearing room during 80% of the thousands of pages of DuPont oral testimony against them (*ibid.*).

(b) Although some of these exhibits and portions of the "confidential" transcript were later declassified by DuPont after the witnesses left the stand or the hearing had been concluded (Pet. 8 & n.12; DuPont Br. 4 n.4), a vast amount of the evidence remains secret. The petitioners have still not been permitted to see the "confidential"

complaint (Pet. 5) or to know the basis for critical elements of the ITC's decision against them, or even to read key parts of that decision (Pet. 8).

(c) These procedures are routinely followed by the ITC in Section 337 hearings (Pet. 11; ITC Br. 26; DuPont Br. 3). No one has been able to persuade the ITC to grant a party access to evidence designated "confidential" by the other side (Pet. 12).

The opposing briefs also agree that the Administrative Procedure Act ("APA") guarantees petitioners the right "to appear in person or by or with counsel" and provides that the "transcript of the testimony and exhibits . . . shall be made available" to them (5 U.S.C. §§ 555(b), 556(e)), and they concede that these rights should have been granted petitioners in the proceedings below (ITC Br. 17-18; DuPont Br. 13). However, respondents assert that these due process guarantees are satisfied if *either* counsel *or* the party are allowed to appear and to have access to the evidence (ITC Br. 12-13, 18; DuPont Br. 8, 11-12). Respondents assume, *sub silentio*, that the choice is the adversary's.

Thus this case squarely presents the issue of whether, consistent with due process and the requirements of the APA, a party accused in an agency proceeding may be subjected to a trial by proxy, denied access both to the documentary evidence against him and to the hearing room, and thus rendered unable to assist counsel in his own defense. Petitioners maintain that they had these fundamental rights *regardless* of whether or not the evidence against them included confidential business data.[1] Respondents have failed to cite a single case to the contrary; their closest "authority" is the *Helminski* autistic child case (see pp. 5-6 below).

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1 In the only ITC case ever to have been reviewed by this Court, Justice Cardozo wrote that if the ITC "was under a duty to give a hearing similar to one in court, it was bound to expose everything, details as well as summaries." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 321 (1933).

While both the facts and the legal positions of the parties are clear with respect to that basic issue, the opposition briefs raise two peripheral arguments. First, they contend that DuPont substantiated its wholesale designations of confidentiality and that petitioners are precluded from contesting that because they failed to follow paragraph 10 of the ITC "protective order".[2] As a fallback position, they assert that petitioners failed to demonstrate prejudice and therefore any denial of due process is not reversible error (ITC Br. 19 n.19; DuPont Br. 10). Both these contentions are factually inaccurate.[3] They are also legally unfounded. Petitioners should not in any event have been required to prove that access to the evidence withheld from them (even if confidential) was "absolutely necessary", as both the ITC and the CAFC insisted (Pet. 20a, 42a; *compare* ITC Br. 15). Nor are they required to prove that the result below would have been different if they had known the evidence against them.[4]

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2 The ITC also claims that "petitioners agreed to the protective order without qualification" (ITC Br. 13). The order was issued *sua sponte* by the ALJ two days prior to the commencement of this proceeding, 49 Fed. Reg. 21806 (May 23, 1984). Before Akzo's counsel could even see a copy of the "confidential complaint", to which a response was due in twenty days, they were required to and did agree to respect the protective order—but they never agreed to refrain from challenging the order, and they did challenge it almost immediately (Pet. 16a).

3 Petitioners advised the ALJ that they were prejudiced by their counsel's inability to cross-examine or rebut without assistance from their client (Pet. 54a), and they showed specific prejudice in that regard (JA 21424). Further, *none* (and obviously not all) of the hundreds of thousands of pages of documents DuPont stamped "confidential" was proven to be secret data which, if disclosed, would cause substantial harm to its 100% monopoly position. No ITC rule or order required DuPont to make such a showing (Pet. 34a) and the only witness who testified as to "confidentiality" was asked about only two documents (his testimony is quoted at Pet. 9).

4 "One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown

Paragraph 10 of the "protective order" (Pet. 37a) states that a party who disagrees with a confidential designation should notify and confer with the adversary before raising the issue with the ALJ. In addition to vigorously seeking to modify the order at every stage (Pet. 16 n.20, 16a, 17a), counsel for Akzo wrote to counsel for DuPont on several occasions asking for declassification of specified data, but to no avail. Just prior to the commencement of the hearing, on receiving DuPont's witness statements and other trial exhibits stamped confidential, Akzo again moved to modify the protective order and specified the direct testimony and exhibits that should be declassified (Pet. 47a, 52a-54a). During petitioners' argument that much of the material DuPont had classified "is clearly not confidential" (JA 21371), the following colloquy (taken from the Joint Appendix below) then occurred:

> "And so we ask Your Honor to review the material that has been withheld . . . we think we are entitled to have a judicial determination with respect to confidentiality and not simply be bound by DuPont's *ipse dixit* that something is confidential." (JA 21371)

Judge Luckern refused, saying:

> "We have that problem, the judges have that problem all the time, and . . . I find it difficult to just read it through and say, well that is obviously non-confidential, because there are so many intricacies, and there are things that go on that we may not know about . . . . And I have seen some instances where I just feel that it is going overboard, but I really have nothing to challenge them

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and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling." *Powhatan Mining Co.* v. *Ickes*, 118 F.2d 105, 110 (6th Cir. 1941).

See also Chapman v. *California*, 386 U.S. 18, 23 (1967) ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"); *Grimm* v. *Brown*, 291 F. Supp. 1011, 1014 (N.D. Cal. 1968), *aff'd*, 449 F.2d 654 (9th Cir. 1971) (citing other cases and noting the "continuing vitality" of *Powhatan Mining*).

> with that. And because of the Commission policy with respect to confidentiality, I let it go by. So that is my problem with what you are suggesting for me to do. I can read it through, but I would have reluctance saying, well, I think this is non-confidential." (JA 21371-72)

Mr. Gribbon, lead counsel for DuPont, then commented:

> "Yesterday, in response to an informal suggestion from Commission counsel, I went to respondents and I said look, *we won't force you to go through the procedure that is set up in the protective order to declassify*.
>
> "I said, tell me what you want and I will see whether we are able to give it to you. Immediately they said, what we want are those forecasts. . . . *I concluded rapidly that there was no possibility of negotiation. . . . I think Your Honor is quite right that what is confidential here is very much within the determination of the company involved*." (JA 21373, emphasis added)

As the above record demonstrates, DuPont's claims of confidentiality were never scrutinized or substantiated, nor was there any question about Akzo's compliance with paragraph 10.

The petition (pp. 16 *et seq.*) showed that the ITC's hearing procedures have never been countenanced in any federal court or in any other agency (although that may change if the decision below is allowed to stand). Yet the opposition briefs argue that excluding a party from his own trial is perfectly proper provided his counsel is allowed to attend and to hear the evidence; they even assert this is a device "frequently" used in federal courts (ITC Br. 26, 16; DuPont Br. 3). To support this extraordinary proposition, respondents cite a number of decisions which are actually to the contrary.

Both respondents rely heavily on *Helminski* v. *Ayerst Laboratories*, 766 F.2d 208 (6th Cir.), *cert. denied*, 106 S.Ct. 386 (1985), to support their "trial by proxy" argument (ITC Br. 18-

19 n.18, DuPont Br. 12 n.17).[5] That case was brought by the parents of an autistic child, who "was completely unable to comprehend the proceedings" and "could not aid his attorney in any meaningful way" (766 F.2d at 218). Defendant claimed that his presence would prejudice the jury, and the boy was excluded from the liability phase of the trial. On plaintiffs' appeal, the court held:

> "[A]bsent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial." (766 F.2d at 216-17)

Although the autistic child could do neither, and both his parents were present throughout to assist counsel, the court held the exclusion improper, but refused to reverse on that ground.

With similar significance, respondents invoke *Doe* v. *District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983), which reversed a jury verdict because a pre-trial discovery protective order prohibited defense counsel from disclosing to their cli-

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5 The ITC also uses *Helminski* to support its "no prejudice" claim (ITC Br. 19 n.19), for which DuPont is content to cite the opinion below's argument that Akzo could have offered its own evidence without knowing DuPont's (DuPont Br. 7, citing Pet. 21a; *but see* Pet. 15). The only other ITC citation for this is *Wirtz* v. *Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963), which held that the Government in an agency proceeding "has an option: it can hold back confidential material, and take the risk of not being able to prove its case, or it can produce the material and allow it to be the subject of direct and cross-examination" (337 F.2d at 528).

In arguing "no prejudice", respondents make much of the irrelevancy that 90 secretaries, clerks, and others assisting the four law firms representing the four respondents acknowledged the protective order so that they could have access to DuPont's 350,000 documents (DuPont Br. n.1) promptly if the need arose. (DuPont alone, with two law firms, had 90 signatories to deal with fewer documents from Akzo.) This only demonstrates the complexity of the case and counsel's great need to have the assistance of their clients, the *only* experts in the aramid fiber business.

ents (prison guards) certain information so as to protect the plaintiff prisoners from bodily harm; and *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959), holding that a party affected by agency action has a personal right to confront the witnesses and to know the evidence against him.

Respondents' other authorities, to the extent they have any relevance, have already been dealt with (Pet. 18-20). In brief, they point up the crucial distinction between the investigation or pre-trial stage and "the adjudication stage [where] very different considerations apply"; *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), which *sua sponte* reversed the sealing of confidential evidence and ordered it made public.

Finally, faced with a total absence of judicial support, respondents attempt to defend the ITC's massive denial of due process on the basis of the need for speed and the alleged uniqueness of the issues in ITC proceedings (ITC Br. 14; DuPont Br. 7). In preliminary injunction and other proceedings, federal courts are regularly faced with expedited hearings involving competitors and proof of future injury based on even more confidential business data—and they regularly conduct them with even greater dispatch than the ITC without depriving the parties of their rights.[6] On the contrary, the very sort of business data withheld here is routinely disclosed and even made public. Thus this "administrative convenience" excuse for departing from due process cannot stand scrutiny.

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6 Tender offer challenges (involving highly confidential business data and complex legal claims) are often litigated to conclusion within the twenty day period required for tender offers. *E.g.*, in *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973), the district court supervised discovery, held an evidentiary hearing and issued a detailed 21-page opinion enjoining the tender offer eight days after the complaint was filed; it was affirmed by the court of appeals a month later.

II. ARTICLE III POWERS

While respondents do not dispute that DuPont orchestrated the proceedings before the ITC (Pet. 23), they nevertheless insist that essentially public rights were involved. Both briefs rely on the CAFC's mischaracterization of the proceedings below as a Government *investigation* (Pet. 28a; ITC Br. 21 n.21; DuPont Br. 14 n.20), citing *Young Engineers, Inc.* v. *United States International Trade Commission*, 721 F.2d 1305 (Fed. Cir. 1983). That decision states: "The 1975 amendment of [Section 337] . . . reflects a recognition that essentially private rights are being enforced in the [Section 337] proceeding" (721 F.2d at 1315). Furthermore, while ITC patent rulings may not have *res judicata* effect in the technical sense, (a) they do bar imports and adversely affect private rights with finality, and (b) the ITC's determinations are *res judicata* as to all non-patent issues in subsequent court proceedings. *Union Manufacturing Co.* v. *Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985).[7]

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7 Congress can easily devise a statute that would protect domestic patentholders without running afoul of Article III. One such solution (already passed by the House and awaiting Senate action) is to give district courts jurisdiction over claims based on infringement of U.S. process patents abroad (H.R. 3, 100th Cong., 1st Sess. (Omnibus Trade & International Policy Reform Act)). A court finding of patent validity and infringement would then result in an injunction directed against the defendant. If U.S. industry were threatened by imports from other manufacturers who were not defendants, an application could be made to the ITC for an *in rem* order running against all foreign manufacturers (as its present orders do). The President's right to veto the ITC order (but not the district court injunction) would remain intact and would not violate any constitutional principle.

III. TREATY RIGHTS

On March 20, 1987, the Commission of the European Communities ("EC") initiated a procedure under the General Agreement on Tariffs and Trade ("GATT") alleging that the ITC's application of Section 337, as exemplified by its treatment of Akzo, constituted discrimination in violation of Article III(4) of the GATT. 52 Antitrust & Trade Reg. Rep. (BNA) 656-57 (April 2, 1987). On the basis of its own investigation, and after consulting independent U.S. law experts, the EC found that "the Community producer does not enjoy the same opportunity for defending himself before the ITC as he would in a normal American court."[8]

Respondents elide the fact that both treaties require that foreign producers *and* their products be accorded national treatment. Since Section 337 applies only to "*imported* goods" (ITC Br. 27 n.25), the question of whether there is discrimination cannot possibly depend on "whether petitioners were accorded the same rights as domestic firms *in a Section 337 investigation*" (ITC Br. 2, emphasis in original in both quotes; *see also* DuPont Br. 17). Inasmuch as domestic products are subject to infringement claims only in district courts, the proper test is whether, in Section 337 proceedings, foreign respondents and their products receive treatment as favorable as that accorded those accused of infringement or unfair practices in district courts. They clearly do not.

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8 The EC also stated that a prior GATT panel's decision in *United States—Imports of Certain Automotive Spring Assemblies*, GATT BISD, 30th Supp. at 107 (May 26, 1983) (Pet. 29 n. 33), is not controlling. As recognized by the ITC (ITC Br. 28), that decision did not find Section 337 "exempt from GATT" (DuPont Br. 17 n.26), but only that it was "necessary" in the circumstances of that particular case—a decision not affirmed on review by the GATT Council (Pet. 29 n.33).

CONCLUSION

The writ of certiorari should be issued as prayed.

Respectfully submitted,

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